

Moving Picture Projectionists Local 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and Roy Alan Simon and Mann Theatres, Party to the Contract.
Case 31-CB-4299

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 2 September 1982 Administrative Law Judge Earledean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by discriminatorily refusing to place Roy Alan Simon on the extra-board (out-of-work) list and by refusing to refer him for employment on and after 13 July 1981¹ because he complained regarding the operation of the Respondent's referral system; and Section 8(b)(1)(A) of the Act by threatening Simon that he would never work in the Respondent's jurisdiction again because he complained regarding the operation of the Respondent's referral system. We conclude that there is merit in the Respondent's exception to the judge's findings of these violations. The facts as found by the judge, amplified by additional undisputed facts, are set forth below.

The Respondent has substantially identical collective-bargaining agreements with approximately 15 employers in the Los Angeles area. The agreements cover film projectionists at the approximately 250 motion picture theaters owned by the employer-signatories. Under the contract referral clause, the Employer agrees to employ projectionists furnished by the Union, but retains the right to reject any job applicant referred; the Union agrees to supply competent projectionists selected on a nondiscriminatory basis.²

¹ All dates hereinafter refer to 1981, unless otherwise stated.

² The agreements provide:

[The Company] hereby agrees to employ those projectionists furnished by the [Union] in any and all projection rooms in which the party of the first part is now or may become interested in during the life of this agreement.

After being informed that a regular projectionist (one employed on a permanent basis to operate a projector in a single screen theater or several projectors in a multiscreen house) is not scheduled, or is unable, to work, the Respondent dispatches the most senior relief projectionist on the out-of-work (extra-board) list. Ralph Kemp is the Respondent's dispatcher and its business manager. To secure placement on the extra-board, an unemployed projectionist must call the Respondent on Monday morning. The projectionist is placed according to a permanent seniority number which signifies the year he first worked 312 days. All persons reaching that level in the same year are assigned the same number; seniority among them is given in the order in which they make their request to be placed on the extra-board.

Roy Alan Simon, the Charging Party, joined the Respondent in 1971, and was expelled in June 1981 because of nonpayment of dues. His seniority number was 20 and, according to him, prior to 14 July he worked "reasonably steady." Simon's last referral came 4 July. Larry Market, division manager for General Cinema Corporation, testified about his 4 July telephone call to Kemp regarding Simon, who was "swinging a relief shift" at General's AVCO Cinema. Market complained to Kemp that, due to Simon's incompetence, the film screening was delayed and he asked that someone else be sent over at least long enough to get the film on the screen. A few days later, Market telephoned Kemp to tell him not to send Simon again to any of General Cinema Corporation theaters.

According to Simon, he sent a letter to the Respondent's executive board, dated 10 July, "asking why the seniority system was being side-tracked, and that I wasn't getting any work."³ Kemp testi-

[The Union] hereby agrees to supply the [Company] with projectionists during the life of this Agreement, and to make every effort to keep these positions filled with competent projectionists without regard to membership or non-membership in a union.

Selection of projectionists for referral jobs shall be on a non-discriminatory basis and shall not be based on or any way affected by Union membership, by-laws, rules, regulations, constitution provisions, or any other aspects or obligations of Union membership, policies or requirements. The Company retains the right to reject any job applicant referred by the Union.

³ Simon's letter reads:

Gentlemen of the Executive Board.

I have been out of work since May 16, 1981 except for a few isolate. [sic] days here and there. I want to know why the seniority system is being side-tracked. Saturday, July 4, 1981 Non-member gets a shift at the AVCO, Westwood and is given four days notice. July 4, Regent Westwood this man wasn't even a member of our local.

Continued

fied that he never saw Simon's letter. Alan Jaquish, secretary-treasurer of the Union, testified that he never saw it nor could he find it in either the executive committee files or the membership files, nor could he find any reference to it in the meeting minutes of either body.

Since his last referral, according to Simon, he had called the Respondent "a dozen or so" times seeking work. He placed the first call on 13 July, and he spoke to Ralph Kemp. Simon testified that he asked if there were any job openings and that Kemp responded by saying, "We received your note to the Executive Board." Simon then replied, according to his testimony, "It wasn't intended for you," and asked again about employment, but was not referred.

Simon testified that he called again, on 14 July, requesting employment, to which Kemp responded, "You can't work for Pacific. Bamossey [sic] doesn't want you working for Mann. I can't place you anywhere . . . find another profession, because you will never work in this jurisdiction again."⁴ Simon testified on cross-examination that, after again asking for work, Kemp replied, "I don't like talking to you. You have a habit of talking to attorneys," and also later said, "find another profession, you will never work in Local 150's jurisdiction again."

According to Simon, on 29 July, he once more telephoned Kemp to ask for work, and Kemp said, "why are you asking me for work, you are suing us." Simon claimed he stated, "[T]hat has got nothing to do with it," and renewed his request for employment. Kemp retorted, "Fuck you," and hung up. Simon testified that again, on 31 July, he called the Respondent, this time asking the office secretary if there were any jobs available. She replied, "Just a minute," put him on hold, and never returned to the line. Between this 31 July attempt and 24 or 25 September, Simon claimed to have telephoned the Respondent's office about six times: When Kemp answered, he made no response to Simon's job inquiries; when the office secretary answered, she placed Simon on hold, never to return to the line. Simon therefore discontinued his telephone inquiries for work.

Since opening of Superman 2 at Village Westwood a man with low seniority has been working at the request of a projectionist who installs screens which should be done by stage hands.

I know that there is not much work for extra-board people but it makes you wonder how many jobs I didn't get that I was qualified to do. I call the local for work at least twice a day and a message can be left for me at 464-1009.

Thank you for taking the time to read this.

⁴ Pacific Theatres is one of the 15 employer-signatories, as is Mann Theatres. At the hearing, the two were characterized as two of the three major chains. The judge incorrectly spelled the name of Mann Theatres' representative, Bamossey, correctly spelled Bamossy.

Kemp testified that, after 4 July, persons with less seniority than Simon were dispatched to jobs, but denied that he refused to refer Simon for unlawful reasons. Kemp asserted that Simon was ineligible for referral, as his name was not placed on the extra-board after 4 July. Kemp testified that his action was taken because management did "not want him to work their theatres, due to past experience." Kemp predicated this assertion on several telephone calls and correspondences he had received from various theater representatives complaining about Simon's performance. Kemp predicted that, if Simon were on the list and, hence, referred, employers would immediately reject him pursuant to their contractual right of refusal, necessitating the dispatch of another projectionist. This would delay the film screening and undermine the employer's faith in the Union as a source of competent employees.

Kemp further denied that he had more than one conversation with Simon after 4 July, or that he made certain statements attributed to him by Simon. According to Kemp, in his only conversation with Simon after 4 July he explained to Simon "that his reputation and nonperformance of duties ha[d] followed him all over Local 150's jurisdiction" such that Kemp could not place him. Kemp mentioned all the theater chains that did not want Simon and reminded him that he refused to work in two theater chains, Sterling and Metropolitan.

Kemp testified that Laemmle, Mann, and Pacific Theatres, the "majority chains," as well as General Cinema, United Artists, and Pussycat Theatres had complained about Simon, and that Simon refused to work at Sterling Theatres because it paid bi-weekly, or at Metropolitan Theatres because it was downtown. Management representatives of some of these theater chains testified in support of the Respondent's position.

Ronald Kuharski, manager of Pacific Theatre's World Theatre, testified about the circumstances surrounding a complaint he lodged with his supervisor concerning Simon. In February, according to Kuharski, at a time when theater patrons were present, Simon shot off a fire extinguisher in the hallway outside the manager's office resulting in damage to the timeclock. Kuharski went to the storeroom to get a pan and broom to clean up the mess "and all of the sudden Roy came storming in" from the lobby where he had been heard "ranting and raving and calling me [Kuharski] names."⁵ Ac-

⁵ Kuharski, who is Jewish, testified that Simon's "usual name for me was the fat-assed Jew, or the Kike," and that, on this occasion, Simon confronted Kuharski, yelling "something to the effect that Hitler should have burned all the Jews."

according to Kuharski, Simon blamed Kuharski for the recent employment shakeup at World Theatres.⁶ Simon then, unprovoked, took a swing at Kuharski, catching the edge of Kuharski's glasses, sending them flying across the hallway. In describing Simon's attitude and working demeanor, Kuharski testified that, "[H]e made it down in the lobby during intermissions and . . . making derogatory remarks about myself, about the corporation, about the executive of the company." Kuharski also testified that, in violation of the collective-bargaining agreement, Simon, almost every night, left the projection booth during the screening of the film.

The matter was referred to Dan Chernow, director of labor relations and personnel for Pacific Theatres. Chernow wrote a letter to Simon, dated 4 February, advising him of his immediate termination, according to the letter, "for leaving the projection booth during performance time without proper authorization, knowingly violating company policy, and attempted contravention of Managements [sic] operation of its establishment." Chernow contacted Kemp after learning that Simon was still employed at the theater. Chernow explained to Kemp that, in accordance with the terms of the letter, Pacific Theatres wanted Simon out immediately and that Pacific Theatres took the position, "[j]ust simply that Mr. Simon was not the kind of individual that was welcome in our theatres."

George Reese, associate owner of Laemmle Theatres, testified that on 1 October 1980 he sent a telegram to Kemp requesting that Simon be immediately removed from assignment to the Regent Theatre. This action, according to Reese, was based on reports from the manager and the regular projectionists that Simon, without authority nor explanation, admittedly altered another employee's timecards; talked with lobby employees during intermission, their busiest time, ignoring the manager's request that he return to his booth; cut out six or eight frames from a film for no apparent reason; ran "zenon" bulbs, the light source for the projector, at an excessively high amperage, notwithstanding having been instructed repeatedly not to do so; destroyed a zenon bulb while it was still under warranty;⁷ and left the booth during screenings to

wander around the village or to get something to eat down the street from the theater.⁸

Alan Bamossy, district manager for Mann Theatres, testified that over the past 2 years "almost every time Mr. Simon was assigned to one of our theatres," Bamossy had a communication with Kemp regarding complaints about Simon. Bamossy testified that the theater managers have "always complained" about Simon's lack of cooperation and insubordination. Bamossy testified that, in June 1978, Simon was employed by Mann's Alex Theatre.⁹ Simon was uncooperative with the manager, not wishing to take requests or orders from her. This "severe personality clash" escalated to the point where Bamossy called Kemp to ask that Simon be released from employment at Alex Theatre.

In July 1979 Simon worked at Mann's Studio City Theatre, prompting another telephone call to Kemp. The theater manager constantly complained about Simon's behavior, including Simon's habit of locking the manager out of the booth. This time Bamossy asked Kemp that Simon be reassigned "to some other area, other than Mann Theatre," as they "were having one problem after another" with Simon.

On 12 August 1980, Simon was assigned to Mann's Vogue Theatre. Bamossy telephoned Kemp asking that Simon be reassigned, again somewhere other than a Mann theater. Bamossy explained that the manager there was under a doctor's care and, based on their previous experience with Simon, he could not take the responsibility of having the manager become seriously ill.

On 16 June Simon was again assigned to one of Mann's theaters, the Triplex Theatre. According to Bamossy, he called and asked Kemp why Simon was working for Mann Theatres again. Kemp explained that Simon was there as a temporary relief for a projectionist on temporary leave of absence. Bamossy requested that Kemp refrain from assigning Simon in the future to a Mann theater. Kemp indicated he would see what he could do about it. In testimony, Bamossy summarized his position: "I complained bitterly [to Kemp] about Simon working at our theatres, because I wanted to eliminate the problem."

As discussed above, Simon's last referral came on 4 July to General Cinema Corporation's AVCO

⁶ Kuharski was sent to World Theatre on a temporary assignment after the discharge for misconduct of the manager, assistant manager, and a large number of hourly employees.

⁷ Reese testified that zenon bulbs cost about \$550 and are warranted for 1500 hours of use but with proper care can be used for 2000 to 4000 hours. Simon had destroyed a bulb which had been used for only 300 hours. By this action, a credit for the remaining 1200 hours of the warranty was lost.

⁸ Roy Amirant, the regular projectionist at the Regent Theatre, testified that he told Reese that Simon "was a disaster, incompetent," and that, inter alia, he ruined the equipment and continuously misadjusted the machines to where they would break the film. According to Amirant, he counseled Simon several times to no avail about proper procedures: instead, Simon's attitude became "very negative."

⁹ The judge incorrectly referred to the Alex Theatre as the Ellis Theatre throughout her decision.

Cinema. Simon's inability to operate the projector became the subject of General Cinema's complaint by Market to Kemp and the basis for its request that Simon never be referred to another of General Cinema's theaters.

According to testimony, Local 150's jurisdiction covers 15 employers controlling 250 screens. Kemp identified 8 employers as having complained to him about Simon's performance: Mann with 49 screens, Pacific with 60¹⁰ screens, Laemmle with 14 screens, General Cinema with 13 screens, United Artists with 8 screens; and Pussycat, Sterling, and Metropolitan, each with an unspecified number of screens. Mann, Pacific, and Laemmle constitute the "majority chains."

Conclusions

According to settled Board law,

When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also . . . where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.¹¹

Hence, by Kemp's admitted refusal to place Simon on the extra-board or refer him to jobs which he otherwise would have had the seniority to take, the Respondent has raised this presumption of unlawful conduct. The Respondent argues that because of Simon's history of misconduct and incompetence his continued referral would jeopardize its position as the employer's exclusive source of employees, thereby diminishing the effectiveness of the representation of its constituency. The Respondent contends that, in its estimation, employer-signatories who provide a majority of the available work have expressed dissatisfaction with Simon and his work, some explicitly requiring that he not be referred again. It is the Respondent's position that, if Simon were referred, these employers would exercise their contractual right to refuse to accept the referred employee.

¹⁰ We arrive at this figure by discounting the number testified to by Kemp, 100, in proportion to the accuracy of his estimation of the number of screens owned by Mann Theatres. Kemp testified that Mann runs 80 screens, when in fact it runs 49.

¹¹ *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973).

The judge, however, found it unnecessary to consider whether the Respondent's position was taken justifiably, because she found that Simon's 10 July letter to the executive board was the factor "animating" Kemp's refusal to place Simon on the extra-board. She reasoned that, based on Simon's credited testimony, when Simon made his 13 July work inquiry, Kemp's only response was to refer to the 10 July letter complaining about Respondent's seniority system and that it was not until Simon's 14 July work inquiry that Kemp's response included some reference to employers not wanting to hire Simon.

The judge attacked the premise of the Respondent's claimed justification and concluded that Simon was barred from only a relatively small proportion of the possibly available jobs. In doing so, the judge made several factual errors and omissions. The judge noted that Pussy Cat Theatres, United Artists, Pacific Theatres, and Mann Theatres had complained regarding Simon's performance, but omitted General Cinema. She stated that, while Laemmle, Mann, and Pacific Theatres had terminated Simon, only General Cinema and Mann Theatres had requested that the Respondent cease dispatching Simon to all their theaters, ignoring the record evidence that, in demanding Simon's immediate termination, Chernow, director of labor relations personnel for Pacific Theatres, told Kemp that Pacific Theatres took the position, "[j]ust simply that Mr. Simon was not the kind of individual that was welcome in our theatres." We find implicit in this statement what was explicit in statements made by representatives of General Cinema and Mann Theatres, i.e., that Simon was not to be referred again for employment. Hence three of four employer representatives appearing testified that their company unquestionably did not want Simon working in its establishments. In addition, Reese, of Laemmle Theatres, testified that he requested that Simon be immediately removed from assignment to Laemmle's Regent Theatre based on egregious conduct, including alteration of records, destruction of property, and insubordination. The judge also failed to include in her calculation uncontradicted testimony that Simon refused to work in two theatre chains, Sterling Theatres and Metropolitan Theatres, thus further limiting the Union's opportunities to refer him.

The judge reached her conclusion that Simon was barred from relatively few employment opportunities by overemphasizing the distinction between termination or requests for removal on the one hand, and a request for a discontinuation of referral on the other. We believe the emphasis is unwarranted because it implies that only after an employ-

er has explicitly requested that a union not refer a particular employee may a union justifiably believe that future referral of that employee would jeopardize its position as the employer's exclusive supply of employees. Under the judge's analysis, even after the employer requests the union's assistance in immediately terminating the employee, the union is to assume that the employer would be more than willing to accept that employee back on referral. To be sure, the purpose of the communication, i.e., whether it is to request the removal of a referred employee or to request a cessation of referral, is a consideration, but so too is the pervasiveness of these communications among the employer-signatories. Here, employer-signatories controlling a majority of the screens,¹² by our calculation 136 of 250, requested the Respondent's cooperation in effectuating the immediate termination/removal of Simon (Laemmle with 14 screens) and/or in refraining from referring Simon to their theaters (Mann with 49 screens; General Cinema with 13 screens; and Pacific with 60 screens). Employer-signatories controlling an undeterminable additional number complained to Kemp about Simon, based on testimony by Kemp which the judge credited (United Artist with eight screens and Pussy Cat Theatres), or were foreclosed as employment opportunities by Simon's own choosing (Sterling and Metropolitan).

In reaching her decision that the 10 July letter was the motivating factor in the Respondent's failure to refer Simon, the judge also reasoned that "it appears unlikely that the July 4 incident [which involved Simon's incompetence] would have precipitated the extreme response of totally denying Simon access to the hiring system," since, "in the main," other employers had not questioned Simon's competence, but rather complained of his misconduct.

We agree that the 4 July incident *alone* would not, as the judge suggested, have precipitated, and would not have justified, the "extreme response" of a refusal to refer. But we do not agree that the 10 July letter was the basis for the refusal to refer.

We find that, notwithstanding the 10 July letter and Kemp's reference to it on 13 July, the Respondent used reasonable judgment, considering all that had transpired up to and including 4 July, in concluding that further referral of Simon would jeopardize its position as the exclusive supply of the employer's employees. Although we accept the judge's credibility finding that, on 13 July, Kemp referred to the 10 July letter after Simon requested

employment, we find that Kemp did so as a result of the fact that Simon wrote the letter at all, considering Simon's work record and, in particular, his very recent discharge, rather than as a signal to Simon that such letter was the reason he would not be considered for further employment. We find that the Respondent has met its burden, particularly since in 1982 alone, within 6 months' time, three employers asked that Simon not be referred to their theaters again—Pacific Theatres in early February; Mann Theatres on 16 June; and General Cinema Corporation a few days after its 4 July incident with Simon. Accordingly, we find that the Respondent's failure to refer Simon did not violate Section 8(b)(2) of the Act.¹³

The judge, without discussion, concluded that by threatening Simon during his 14 July telephone conversation with Kemp, that he would never work in the Respondent's jurisdiction again, the Respondent violated Section 8(b)(1)(A) of the Act. According to Simon, Kemp said, "I can't place you anywhere," and then later on said, "Find another profession, you will never work in this jurisdiction again." We do not consider this to be a threat. Rather, we consider it to be a statement of fact to the effect that Kemp felt constrained, in light of Simon's prior work difficulties which Kemp mentioned, not to refer him to jobs within its jurisdiction. Accordingly, we shall dismiss this allegation of the complaint.

ORDER

The complaint is dismissed.

¹³ See *Plasterers Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981), where the Board found that the respondent's judgment not to place the charging party in the "priority referral group" was not violative of Sec. 8(b)(2) since it was based on objective indications that the employee's background experience was marginal and that he was a substandard performer on the initial referral.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was tried before me in Los Angeles, California, on May 25, 1982. The charge was filed by Roy Alan Simon, an individual, herein called Simon, and served on Moving Picture Projectionists Local 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, herein called the Respondent, on July 24, 1981. On September 15, 1981, a complaint issued alleging that the Respondent has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, herein called the Act.

The basic issue herein is whether the Respondent refused to refer Simon to employment with Mann Theatres

¹² The accuracy of this conclusion is buttressed by the uncontradicted testimony that Mann, Pacific, and Laemmle Theatres constitute majority theater chains.

and other employers because of irrelevant, invidious, or unfair considerations.

On the entire record, including my observation of the witnesses and after due consideration of the oral arguments and posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mann Theatres Corporation of California, herein called Mann Theatres, a California corporation with an office and place of business in Los Angeles, California, is engaged in the operation of motion picture theatres for the general public. In the course and conduct of its business operations, Mann Theatres annually derives gross revenues in excess of \$500,000 and annually purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California.

The complaint alleges, the Respondent admits, and I find that Mann Theatres is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Respondent is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent has collective-bargaining agreements with approximately 15 employers in the Los Angeles area covering projectionists at approximately 250 motion picture theatres. These agreements provide, inter alia:

[The Company] hereby agrees to employ those projectionists furnished by the [Union] in any and all projection rooms in which the party of the first part is now or may become interested in during the life of this agreement.

[The Union] hereby agrees to supply the [Company] with projectionists during the life of this Agreement, and to make every effort to keep these positions filled with competent projectionists without regard to membership or non-membership in a union.

...

Selection of projectionists for referral jobs shall be on a non-discriminatory basis and shall not be based on or any way affected by Union membership, by-laws, rules, regulations, constitution provisions, or any other aspects or obligations of Union membership, policies or requirements. The Company retains the right to reject any job applicant referred by the Union.

Regular projectionists are employed on a permanent basis to operate a projector in a single-screen theatre or

several projectors in a multiscreen house. When a regular projectionist is not scheduled, or is unable, to work, a relief projectionist is referred to the job by the Respondent.¹ The duration of these relief positions may range from one shift to 1 year. Normally the regular projectionists, not the employer, contacts the Respondent to secure a relief projectionist.

The Respondent dispatches relief projectionists in accordance with an out-of-work list, referred to as the "extra board." An out-of-work projectionist who is desirous of a referral as a relief projectionist is required to telephone the Respondent on Monday morning to request placement on the extra board. Each projectionist is assigned a permanent seniority number dependent on the year he or she first worked 312 days. All persons who reach this goal in a particular year are assigned the same number. The lowest number connotes the highest seniority. The most senior projectionists are the first to be referred. If there is more than one projectionist on the extra board with the same seniority number the one who requested placement on the extra board first is the first of those within that seniority group to be called by the dispatcher for a referral.

Roy Alan Simon first became a member of the Respondent about 1971 and was expelled in June 1981 because of nonpayment of union dues. He worked as a repair technician until 1975 when he began working as a relief projectionist from the extra board. His seniority number is 20. During 1981, prior to July 14,² according to Simon, he worked "reasonably steady"; that is, there were no unduly prolonged intervals between jobs. His last referral was on July 4 to AVCO Cinema in Westwood which is owned by General Cinema Corporation. About 2 or 3 hours after Simon's shift began that day, Larry Market the division manager for General Cinema, telephoned Kemp complaining that the projector operated by Simon had been down for some time, and that Simon was incompetent and he requested that another projectionist be sent out immediately to replace Simon. Kemp did dispatch another projectionist.

On July 10, according to Simon, he sent a letter to the Respondent, addressed to the executive board, the body of which reads:

Gentlemen of the Executive board.

I have been out of work since May 16, 1981 except for a few isolate [sic] days here and there. I want to know why the seniority system is being side-tracked. Saturday July 4, 1981. Non-member gets a shift at the AVCO, Westwood and is given four days notice. July 4, Regent Westwood this man wasn't even a member of our local.

Since opening of Superman 2 at Village Westwood a man with low seniority has been working at the request of a projectionist who installs screens which should be done by stage hands.

¹ Regular jobs are obtained through a seniority bidding system.

² All dates hereinafter will be in 1981 unless otherwise indicated.

I know that there is not much work for extra-board people but it makes you wonder how many other jobs I didn't get that I was qualified to do. I call the local for work at least twice a day and a message can be left for me at 464-1009.

Thank you for taking the time to read this.

On July 13, Simon telephoned the Respondent's office and spoke to Ralph Kemp, the Respondent's business manager.³ According to Simon, he asked if there were any work available.⁴ Kemp replied, "we received your note to the executive board."⁵ Simon said, "It wasn't intended for you," and again asked, "Are there any jobs available?" However, Kemp did not refer him to a job. Simon further testified that on July 14 he again spoke with Kemp. On direct-examination he testified that he asked if there were any work. Kemp said, "You can't work for Pacific. Bamossy doesn't want you working for Mann. I can't place you anywhere." Kemp then said, "Find another profession, because you'll never work in this jurisdiction again." On cross-examination he testified that he asked, "Is there any work?" Kemp replied, "I don't like talking to you. You have a habit of talking to attorneys," and at some point further said, "find another profession, you'll never work in Local 150's jurisdiction again."⁶

On July 29, according to Simon, he telephoned Kemp and asked if there were any work. Kemp replied, "Why are you asking me for work, you are suing us."⁷ Simon said, "That has got nothing to do with it. Is there any work?" Kemp said, "Fuck you," and hung up. Simon also testified that on or about July 31 he telephoned the Respondent's office. When the office secretary answered, he asked if there were any work. She said, "Just a minute," left the line, and never returned. Thereafter Simon telephoned the Respondent's office about a half dozen times, the last of which was on or about September 24 or 25.⁸ Kemp answered the phone several times, and when Simon asked if there was any work, made no

response at all.⁹ When the secretary answered the phone, each time he would ask if there were any work, and each time, she said, "just a minute," left the line, and never returned. After these several attempts, he decided it was futile to keep calling and has not telephoned the Respondent's office again.

Kemp admits that he refused to dispatch Simon, and that person with less seniority than Simon were referred to jobs. However, he denies that he did so for unlawful reasons or that he made certain statements attributed to him by Simon. According to Kemp, he refused to refer Simon because Simon had not been performing his job duties properly, certain employers had exercised their contractual right to refuse to accept him, and if Simon were dispatched he would be summarily rejected and a second projectionist would have to be dispatched which would delay the screening at the theatre and jeopardize the Union's position as the employer's source of employees.

As to the alleged July 13 and July 29 conversations, Kemp testified that he had only one conversation with Simon after July 4 during which Simon sought placement on the extra board and they discussed Kemp's reasons for not referring Simon to jobs. According to him, he told Simon that a referral employee is a temporary employee on the out-of-work list and management did not want him to work their theatres due to past experience. Kemp further said that management would not accept him in any theatre in the Union's jurisdiction, that his reputation and his nonperformance of duties had followed him all over the Union's jurisdiction, and that Kemp could not place him. Kemp also mentioned all of the employers for whom Simon could not work, including Metropolitan Theatres and Sterling Theatres for whom Simon had refused to work because Metropolitan was located downtown, an area in which Simon did not wish to work, and because Sterling paid biweekly.

Kemp denied that he ever saw Simon's July 10 letter to the executive board. Alan Jaquish, secretary-treasurer of the Union, also testified that he has never seen this letter. However, he admits that no one person has custody or control of all incoming correspondence and that he was on vacation during July. According to him, in response to the subpoena requesting production of the letter, he examined the Respondent's files and the minutes of the membership meeting and the executive board meetings but found neither the letter nor any mention of it.¹⁰ Jaquish also testified that a letter to the executive board would normally be placed on his desk, and that when he is absent it is left there until his return. However, he admits that someone screens such correspondence to determine whether it requires immediate attention.

Several employer representatives testified in support of the Respondent's position. Larry Market, division man-

³ Kemp is also the dispatcher. According to Simon's undenied testimony, which I credit in this regard, over the years he has received about 95 percent of his referrals from Kemp.

⁴ Simon testified that, once one is placed on the extra board, the usual procedure is for the dispatcher to contact one to offer a job referral. However, in January, Simon moved to a hotel and thereafter, since he has no personal telephone, he telephoned the Respondent's office once or twice a day to inquire if there were any work. This was a means of ensuring that he did not miss any message the Respondent left for him at the hotel.

⁵ Simon understood Kemp to be referring to his July 10 letter to the executive board. He has received no other acknowledgement of, or response to, this letter, and he had sent no other letter or note to anyone connected with the Respondent.

⁶ According to Simon, he did not recall this remark until he was testifying on cross-examination. He denied, on cross-examination, that Kemp said he could not work in Local 150's jurisdiction because he had been fired by Mann Theatres or that Kemp said he had been fired by every theatre for which he had worked. However, he did not specifically recant his earlier testimony that Kemp also said, "You can't work for Pacific. Bamossy doesn't want you working for Mann. I can't place you anywhere."

⁷ Simon filed the charge herein on July 24.

⁸ He recalls telephoning on August 4, 5, 6, and 7.

⁹ Simon testified that, because of his accent, he has never had to identify himself when he telephones the Respondent. His voice is always recognized.

¹⁰ In July the executive board met on July 6, 20, and 27. The executive board normally meets on three Mondays in each month. It does not meet during the week the membership meeting is held. The membership meeting was held on July 14.

ager for General Cinema, testified that on July 6, following the July 4 incident at the AVCO Cinema, he telephoned Kemp and stated that he would appreciate if it Kemp did not dispatch Simon to General Cinema Theatres in the future because he thought Simon was incompetent.¹¹

George Reese, associate owner of the Laemmle Theatres,¹² testified that Simon worked at one of their theatres, the Regent, in 1980. During September of that year, Reese received complaints from the manager and/or the regular projectionist at the Regent that Simon was distracting other employees during intermission;¹³ has altered the timecard of the regular projectionist; was misusing equipment; was not following proper operation procedure for the use of xenon bulbs, the light source for the projector, and had destroyed a bulb which was still under warranty;¹⁴ had cut out six to eight frames of a film without reporting any reason for doing so; and had left the project booth during a screening.¹⁵

On October 1, 1980, Reese sent Kemp a mailgram, the body of which reads:

Please take Roy Simon, relief projectionist, off of assignment to the Regent Theatre Westwood, immediately today Wednesday October 1, 1980.

Reese admits, however, that Laemmle Theatres has never requested that Simon, or any other relief projectionist, not be referred to any of its theatres.

Alan Bamossey, district manager for Mann Theatres,¹⁶ testified that the theatre managers under him have complained regarding Simon's lack of cooperation and insubordination for a period of 2 or 3 years prior to August 1980. Bamossey complained to Kemp regarding Simon on several occasions during this period. In June 1978, Simon had a severe problem with the manager of the Ellis Theatre. He did not want to take orders or requests from her. Bamossey telephoned Kemp and requested that Simon be removed from the job. Thereafter Simon was not referred to Mann Theatres for several months. At some point, such referrals did resume and in July 1979, Bamossey telephoned Kemp and told him that they had a problem with Simon working in any Mann Theatre, that they were having one problem after another with him whenever he was assigned to one of their theatres and requested that Simon not be referred to any Mann Theatre.

Nevertheless Simon was referred to one of the Mann Theatres, the Vogue Theatre, on August 12, 1980. According to Bamossey he telephoned Kemp, told him that the manager of the Vogue Theatre was under a doctor's care and, based on their previous experience with Simon,

he could not take the responsibility of having this manager become seriously ill. He requested that Simon not be referred to a Mann Theatre again, if possible. Simon was again referred to a Mann Theatre on June 16, 1981. Within a month thereafter Bamossey telephoned Kemp and inquired as to why Simon had been referred to a Mann Theatre. Kemp replied that one of the projectionist had to take a leave of absence. Bamossey asked Kemp to please refrain from referring Simon to Mann in the future. Kemp said he would see what he could do about it.

In February, Simon was assigned to the World Theatre which is owned by Pacific Theatre. According to Ronald Kuharski, manager of the World Theatre, apparently Simon blamed him personally for the mass discharge of a number of employees at the World Theatre. Simon's reaction was to engage in derogatory and disruptive remarks to other employees and to Kuharski and about Kuharski, the employer, and the employer's executives. On the last day that Simon worked there, according to Kuharski, he was ranting and raving and calling Kuharski derogatory names in the lobby in the presence of other employees and of patrons. He also shot spray from a fire extinguisher outside of Kuharski's office which gummed up the timeclock and made quite a mess. He then confronted Kuharski, directed several accusations and antisemitic slurs toward Kuharski and took a swing at him, which did not actually connect with Kuharski's person but did hit the edge of his eyeglasses causing them to sail across the hallway.

Kuharski reported these incidents to his district manager who reported them to Dan Chernow, director of labor relations and personnel. On February 4, Chernow sent Simon a letter of termination, with a copy to Kemp, the body of which reads:

This letter is to serve as notice in writing of your immediate termination as projectionist at the World Theatre.

You are terminated for leaving the projection booth during performance time without proper authorization, knowingly violating Company policy, and attempted contravention of Managements operation of its establishment.

According to Chernow, Simon did not leave the theatre immediately, so he telephoned Kemp, informed him that Simon was still working, and requested that he leave immediately. Chernow further testified that prior to the incident at World Theatre other Pacific managers¹⁷ had spoken to him on several occasions regarding Simon's attitude and disruptive influence. However, there had been time periods between the comments. Thus it had not seemed necessary to take any action.

¹¹ General Cinema operates 13 theatres in the Union's jurisdiction.

¹² Laemmle Theatres operates 14 screens in 8 buildings.

¹³ Intermission is a very busy work period for these other employees.

¹⁴ Reese testified that xenon bulbs cost about \$550 and are warranted for 1500 hours of use but with proper care can be used for 2000 to 4000 hours. Simon had destroyed a bulb which had been used for only about 300 hours. by his action, a credit for the remaining 1200 hours of the warranty was lost.

¹⁵ Projectionists are required to remain in the booth while a film is being screened.

¹⁶ Mann operates 40 screens in 23 buildings in the Union's jurisdiction.

¹⁷ Neither Chernow nor Kuharski testified as to the number of theatres operated by Pacific in the Respondent's jurisdiction. Kemp testified that Pacific probably operates 100 theatres. However, he also testified that Mann operated about 80. Since Mann only operates 49 screens in 23 buildings, Kemp's testimony in this regard does not appear particularly reliable.

Kemp testified that he also received complaints regarding Simon from the Pussy Cat Theatres and from United Artists.

Conclusion

Kemp admits, and the evidence establishes, that he refused to place Simon on the out-of-work list or refer him to jobs to which his seniority number and proper placement on the extra board would have entitled him. Such conduct is presumed to encourage union membership on the part of all employees who have perceived the exercise of this power to affect an employee's livelihood, and the Union has the burden of showing that its actions were necessary to the effective performance of its function of effectively representing its constituency. *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973); *Electrical Workers IBEW Local 873 (Kokomo-Marian Division)*, 250 NLRB 928 fn. 3 (1980). To this end the Respondent argues that Simon was not refused placement on the extra board because employers providing the majority of available jobs had exercised their contractual right to refuse to accept Simon for employment and because Simon's history of misconduct and incompetence was such that his continued referral would jeopardize the Respondent's position as the employer's exclusive source of employees.

With regard to the first reason, the evidence establishes that while Pussy Cat Theatres, United Artists, Pacific Theatres, and Mann Theatres had complained with regard to Simon, and Laemmle Theatres, Mann Theatres, and Pacific Theatres had terminated Simon or requested that he be removed from a specific assignment to one of their theatres, only General Cinema and Mann Theatres had requested that the Respondent cease dispatching Simon to all of their theatres. Thus Simon was barred from only a relatively small proportion of the possibly available jobs, and persons within and below his seniority grouping have been dispatched since July 14 to jobs with employers other than General Cinema and Mann Theatres.

As to the Respondent's second contention that Simon's misconduct and incompetence tended to jeopardize the Respondent's status as the exclusive supplier of projectionists to employer-signatories, there is support in the Board's decisions for such a legal theory. Thus, the Board has found that certain union action affecting an employee's employment status, though incidentally encouraging union membership, is lawful where such action is motivated by the employee's misconduct and is essential to the Union's effective representation of employees. See *Operating Engineers Local 18*, supra. In *Plasterers Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386 (1981), the Board affirmed the Administrative Law Judge's findings that the Respondent therein had not violated the Act by refusing to dispatch an employee based on its judgment that the employee was not qualified as a journeyman. In so finding, the Administrative Law Judge concluded:

. . . when a union seeks, in the interests of its constituency as a whole to have initial influence in the regularizing and decasualization of the hiring process

ess through the operation of an exclusive hiring hall, it must have credibility with employers as being a reliable source for the furnishing of trained and experienced personnel. And, while it is true that the Union's primary purpose is not so much to act as a "screening" agency for employers as it is to ensure that its constituents get their fair share of work opportunities under controlled conditions, a union necessarily must employ reasonable eligibility standards in selecting applicants for referral. If it fails to do so and uncritically refers individuals to jobs without regard to their qualifications for the work, it ceases to have any real value to employers in the industry and thereby undermines its own proper interest in playing a central role in the hiring process.

However, in the circumstances herein, I find it unnecessary to reach the question of whether the Respondent would have been warranted in concluding, without bad faith or hostility, that Simon's conduct sufficiently undermined its status as the exclusive supplier of projectionists to employer-signatories so as to justify a refusal to place him on the extra board. Rather, I conclude that Simon's July 10 letter to the executive board was the motivating factor which caused Kemp to refuse to place Simon on the extra board.

In this regard I note Simon's testimony that in his July 13 conversation with Kemp, when he inquired as to whether there was any work available, Kemp's only response was to refer to the July 10 letter. It was not until the July 14 conversation that Kemp made some reference to employers not wanting to hire Simon. Although Kemp denies ever seeing this letter, I found that Kemp had a tendency to slant his testimony in a manner which he deemed to be more favorable to the Respondent. I also note that the clerical employee who receives and distributes the mail did not testify. Rather the only witness, other than Kemp, who testified in this regard admits that, although he never saw the letter or any reference to it, he was on vacation and did not come into the Respondent's office during the period that the letter would have been received in the due course of the mails.

I further note, as set forth above, that only two employers requested that Simon not be dispatched to any of their theatres and that in the past, despite certain complaints as to Simon's misconduct, the Respondent continued to refer him to jobs and, in fact, referred him to Mann Theatres even after Kemp had been requested not to do so. Also, Simon's problem on his last assignment on July 4 involved his competence rather than any misconduct. Yet, in the main, other employers had not questioned Simon's competence. Thus it appears unlikely that the July 4 incident would have precipitated the extreme response of totally denying Simon access to the hiring system. In all of the circumstances, including the demeanor of the witnesses, testimonial inconsistencies, and after a consideration of the probabilities, I credit Simon as to his conversations with Kemp during July and as to the subsequent refusals to speak to him when he telephoned the Respondent with regard to the availability of work.

Accordingly, I find that the Respondent refused to place Simon on the extra board and to refer him to jobs to which his seniority number and proper placement on the extra board would have entitled him because he complained as to the operation of the Respondent's referral system. I further find that, by such conduct, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act. *Laborers Local 207 (A & E Construction)*, 206 NLRB 902 (1973); *Longshoremen Local 814 (West Gulf Maritime Assn.)*, 215 NLRB 459 (1974); *Electrical Workers IBEW Local 675 (S & M Electric)*, 223 NLRB 1499 (1976).

I also find that, by threatening Simon during his July 14 telephone conversation with Kemp that he would never work in the Respondent's jurisdiction again, the Respondent has violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Mann Theatres is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
3. By discriminatorily refusing to place Roy Alan Simon on the extra board and refusing to refer him for employment on and after July 13, 1981, because he complained regarding the operation of the Respondent's referral system, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act.
4. By threatening Roy Alan Simon that he will never work in the Respondent's jurisdiction again because he complained regarding the operation of the Respondent's

referral system, the Respondent has violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully refused to place Roy Alan Simon on the extra board and to refer him for employment to which his seniority number and placement on such list would entitle him, it shall be recommended that the Respondent place Simon on the extra board, upon request, in accordance with its nondiscriminatory referral system. It shall be further recommended that the Respondent make Simon whole for any loss of earnings suffered by him as a result of the discrimination against him by payment to him of a sum of money equal to the amount of wages he would have earned but for the discrimination against him. Such back-pay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁸

[Recommended Order omitted from publication.]

¹⁸ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).